

Commercial Law

A Brief Introduction to USAID's Commercial Legal and Institutional Reform Projects

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3 tons of law to return to Afghanistan

By Chris Woodyard, USA TODAY

ISLAMABAD, Pakistan — The law is about to return to a notoriously lawless land.

This time, it's coming by truck.

A thousand copies of the criminal, civil and commercial laws that existed in Afghanistan until 1973 — nine volumes and 1,760 pages per set....



The Evolution of Commercial Laws

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- 1300s: Multiyear partnerships begin in Med.
- 1500s: Standardized commercial accounting.
- 1600s: Chartered companies begin global trade.
- 1700s: Joint-stock companies; shareholder rights.
- 1800s: 1st Industrial Revolution:
 - Intellectual Property, Universal incorporation, limited liability.
- 1950s: 2d Industrial Revolution:
 - Modern corporation & the modern bank
- 2005: Shape of things to come?



Attributes of Successful Commercial Law Regimes

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- Protection of property rights.
- Freedom of contract, and enforcement of contracts.
- Stability of laws, but...
 - Flexibility and innovation necessary to allow for more efficient production models.
- Limitation on government authority
 - Allows for mass financial mobilization by private sector.



Does Commercial Law Matter?

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- ◆ Societies with market-friendly legal systems are more likely to be:
 - Prosperous
 - Stable
 - Non-corrupt
 - Transparent
 - Democratic



Why Commercial Law Will Matter to You

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◆ The Millennium Challenge Account

“Many of the old models of economic development assistance are outdated. Money that is not accompanied by **legal** and economic reform is oftentimes wasted.”

-President Bush, 3/14/02

◆ The Doha WTO Ministerial Conference

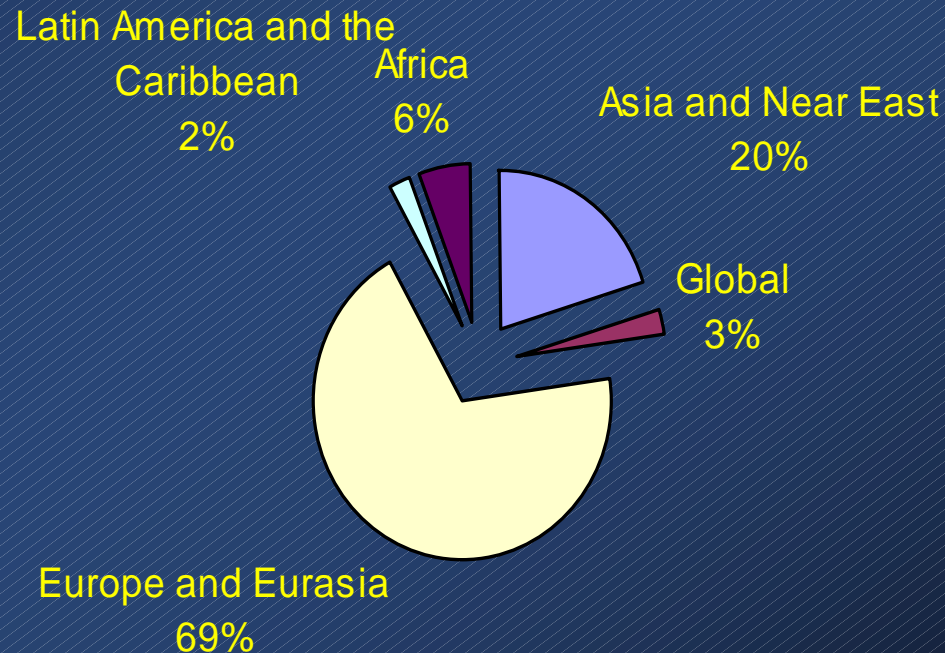
US, EU, and other developed countries promise to assist developing countries in trade capacity building efforts.



Where USAID's LIR Projects Are:

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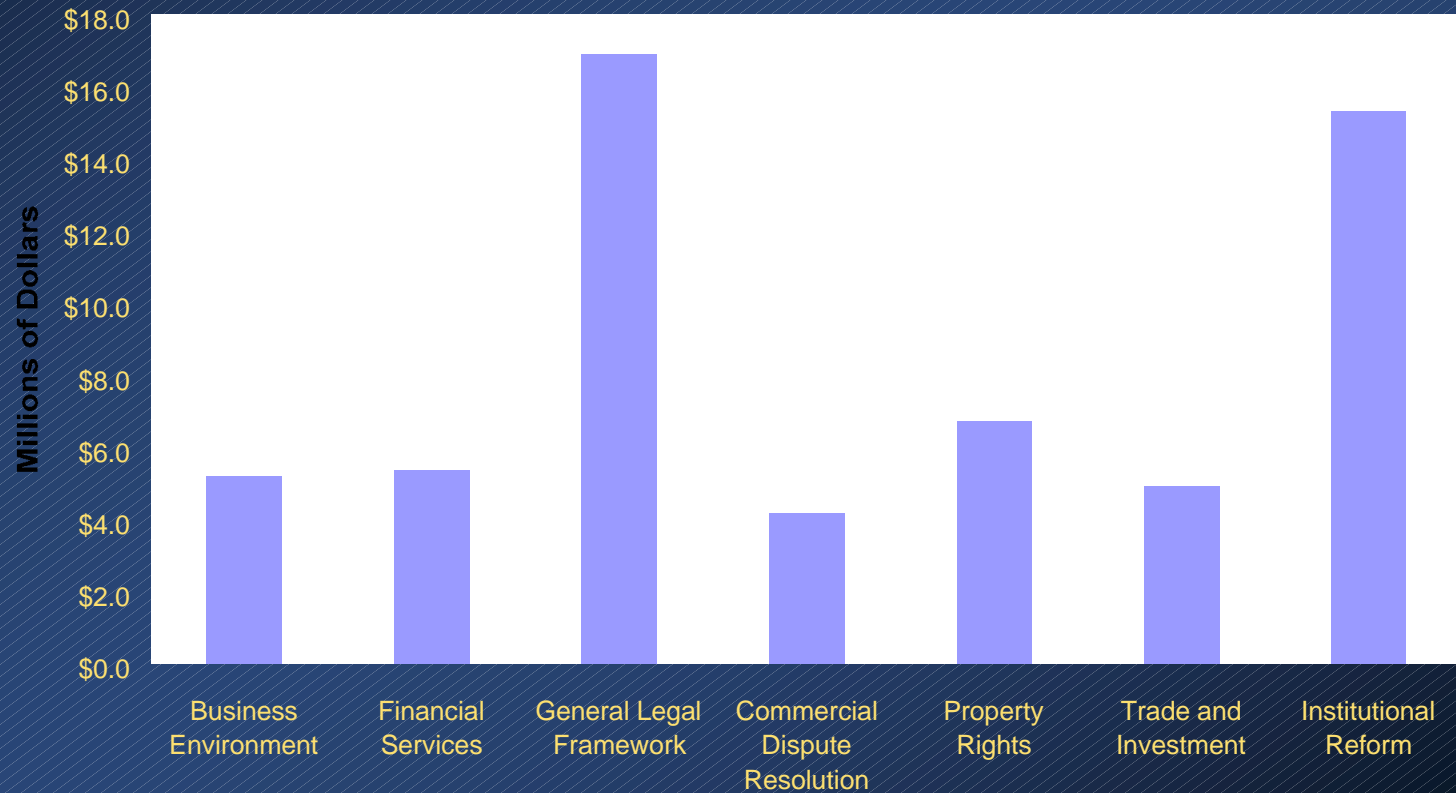
Legislative and Institutional Reform Distribution of Task Order Values by Region \$58.6M Obligated 1997-2002



SEGIR LIR IQC: Dollar Value of Task Orders

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SEGIR LIR
Task Order Values by Sub-component



Typical Commercial Law Areas...

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- Land/Mortgage
- Collateral
- Contract
- Commercial Dispute Resolution
- Company
- Bankruptcy
- Competition
- Foreign Direct Investment
- Trade



- ◆ Creates and protects recognized property rights
- ◆ A system that taps the asset value of immovable objects.
- ◆ What's important to know about it?
 - Mortgages allow people to buy homes, giving people bigger stakes in their communities.
 - Mortgages also allow people who own homes to borrow against equity and finance new businesses. (Hernando de Soto)
 - Doesn't work properly without judicial and executive branch enforcement, i.e., no molly-coddling creditors.



- ◆ A system that taps the asset value of movable objects, thereby facilitating commercial lending
- ◆ Creates and protects recognized property rights in assets.
- ◆ What's important to know about it?
 - UCC Filings are better than pawn shop system.
 - Borrowers get loans under better conditions and banks can still remain profitable.
 - Definition of "Assets" can be broad. Compare a farmer's tractor with a farmer's anticipated harvest from his peach orchard next year.



- ◆ A system of creating, interpreting, and enforcing commercial obligations between parties.
- ◆ What is important to know about it?
 - Very complicated and detailed
 - Covers numerous areas, and may make numerous exceptions.
 - Requires independent, efficient, non-biased dispute resolution mechanisms.
 - Also requires certainty of efficient enforcement by marshal, sheriff, etc.



Commercial Dispute Resolution

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- ◆ The system or systems that help resolve commercial disputes among two or more parties.
 - Courts
 - Alternate Dispute Resolution mechanisms
 - Conciliation
 - Arbitration
- ◆ What is important to know about it?
 - Market augmenting government: Knowing in advance that agreements will be enforced in case of default will make all parties to a contract more likely to engage in longer-term/complicated/expensive relationships.
 - Requires impartial, efficient, institutions.
 - Relies on certainty of efficient enforcement by sheriff.



- ◆ Company Law: A system that allows for market entry and operation that defines norms for the organization of formal commercial activities by two or more individuals.
- ◆ What's important to know about it?
 - Method by which an entrepreneur(s) can limit liability to corporate assets of the company, versus the house and personal possessions.
 - Typical Eurasia laws are burdensome and mitigate entrepreneurialism. Ukraine imposed 100 separate steps for incorporation, estimated to take three months to achieve.
 - Good laws will have no or low base capital requirements, have a nearly automatic approval system, and attract market activities into the formal sector.



- ◆ A system that facilitates the orderly termination of commercial activity of enterprises through liquidation or rehabilitation. The process will result in the extinguishing most of the outstanding financial claims by creditors
- ◆ What's important to know about it?
 - Bankrupt enterprises usually owe large debts that increase with time to numerous creditors, pose a drain on government treasuries, and rob the private sector of scarce capital.
 - Imposes the discipline of restructuring if and only if an enterprise is commercially viable
 - Imposes liquidation, if an enterprise has no market value.



- ◆ A system that preserves competition in the market forces by regulating or proscribing monopolistic and/or oligopolistic behavior.
- ◆ What is important to know about it?
 - Economics 101: Oligopolistic and monopolistic behavior stifles innovation and increases in productivity and efficiency, and hurts consumers through less choice or higher prices.
 - Many recently privatized firms enjoy cozy relationships with governments. Witness government bailouts in Ukraine and Russia of bankrupt enterprises.
 - Need to have strong, powerful antimonopoly authorities in order to take on politically powerful firms. E.g., Microsoft in US.



Foreign Direct Investment

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- ◆ A system that regulates the treatment of foreign investment.
- ◆ What is important to know about it?
 - National (or equal) treatment: Are foreign investors treated as well as native ones?
 - protection of person and of property from expropriation
 - burdensome or discriminatory licenses, permits, approvals needed?
 - Is repatriation and/or transfer of assets guaranteed?
 - Is there a process for dispute resolution through Investment Treaties (BIT) or other means?



- ◆ A system that governs the cross-border sale of goods and services.
- ◆ What is important to know about it?
 - Accession and compliance with World Trade Organization (WTO) requirements is the best route for engendering international trade.
 - WTO Covers 26+ agreements, and growing. Key Themes:
 - Transparency in procedures
 - National Treatment
 - Most Favored Nation status



There are other laws not covered here, like...

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- ◆ Insurance
- ◆ Banking
- ◆ Capital Markets
- ◆ Partnerships



In fact, every human activity imaginable
can be regulated by law...

...but don't try it!

